SUPREME COURT, U. S.

JUL 19 1962

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No. 264

In the

Supreme Court of the United States

October Term, 1961

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE W. GOWINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE PENNSYLVANIA RAILROAD COMPANY,
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vs.

GEORGE W. GOWINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on March 6, 1962.

OPINIONS BELOW

The proceedings before the United States District Court for the Southern District of Ohio, Eastern Division, are unreported and appear in the transcript of the record. The opinion of the United States Court of Appeals for the Sixth Circuit dated March 6, 1962 is reported at 299 F. 2d 431 and appears herein in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered March 6, 1962. Petitioner filed a petition for rehearing which said Court denied by order entered April 30, 1962. The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, U.S.C.

QUESTION PRESENTED

This case involves the applicability of the Boiler Inspection Act, Section 22, et. seq., Title 45, U.S.C., to injuries claimed by respondent to have been received while in the employ of petitioner. The question presented is:

1. Where respondent testified that in the course of his duties he walked in oil on walkways of a locomotive and that after he debarked said locomotive to a ground surface of cinders and soil he lined up a switch and then went to a nearby telephone and from there walked a distance of 200 to 250 feet to an automobile parked near the tracks and that he conversed with the driver of the automobile 5 or 10 minutes and that he then went to the tracks and, while attempting to board a moving locomotive, slipped and tripped on a ground line air hose, did the Court of Appeals err in holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury?

STATUTES AND REGULATIONS INVOLVED

The statute involved is Section 23, Title 45, U.S.C., which reads as follows:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts

and appurtenances thereof have been inspected from time to time in accordance with the provisions of section 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The regulations involved are regulations of the Interstate Commerce Commission found in the Code of Federal Regulations, Title 49, Part 91, Sections 91.200, 91.203 (a), and 91.229 (a) and (d), as follows:

"§91.200 *Applicability of subpart.*

This subpart contains rules and instructions for the inspection and testing of locomotives propelled by other than steam power. . . .

"§91.203 *Trip or daily inspection.*

(a) Each locomotive unit when used in road service (including belt-line, transfer or work-train service) shall be inspected at least once every 24 hours, . . .

"§91.229 *Cabs and aprons.*

(a) Definition. The word "cab" as used in the rules and instructions in this subpart means that portion of the superstructure utilized for housing the enginemen and parts or appurtenances of the locomotive and through which a passageway is provided for the use of the engineman. . . .

"(d) *Floors.* Deck plates and floors of cabs, passageways, and compartments shall be kept free from oil, water, waste, or any obstruction that will create unnecessary peril. . . ."

STATEMENT OF THE CASE

The respondent, plaintiff below, commenced this action against petitioner in the United States District Court for the Southern District of Ohio, Eastern Division. The jurisdiction of that court was based on Section 1337, Title 28, U.S.C. and Section 56, Title 45, U.S.C. The respondent made allegations of negligence in his complaint seeking to invoke the Federal Employees Liability Act, Section 51, et seq., Title 45, U.S.C. and other allegations seeking to invoke the Boiler Inspection Act, Section 22 et seq., Title 45, U.S.C.

At the trial the evidence showed that respondent was employed by petitioner as the conductor of a train crew operating a train from Georgetown, Ohio, to Cadiz Junction, Ohio, and return on November 11, 1959. (R. 26a)

The train cars were hauled by four similar diesel locomotives. (R. 33a) Respondent testified that oil was present on the walkways of the locomotives. (R. 37a) He also testified that it was necessary for him to use the walkways in order to travel between the engine cab and the ground. (R. 37a)

Upon the return of the train to Georgetown, respondent debarked the locomotive at the east end of the Georgetown yard in order to line up a switch. (R. 38a) Respondent then proceeded to a telephone located nearby while the train entered the yard for the purpose of placing cars. (R. 38a; 39a and R. 58a) After using the telephone respondent walked 200 to 250 feet to a parked station wagon automobile occupied by its driver, another employee of petitioner. (R. 59a) The ground surface of the yard in the area over which respondent walked consisted of cinders and soil. (R. 13a and 22a) The evidence showed that there was oil present on that same ground surface. (R. 22a) Respondent

stood and talked to the driver of the station wagon for 5 to 10 minutes (R. 59a), and, upon the approach of his locomotive, respondent went to the track to climb aboard. (R. 39a) Respondent testified that as he attempted to board the moving locomotive, he "slipped and tripped," over a ground line air hose located beside the track. (R. 40a) As a result of the slipping and tripping, respondent sustained his alleged injuries.

At the conclusion of all the evidence, petitioner moved for a directed verdict on the grounds that (1) there was no evidence of negligence under the Federal Employers Liability Act, and (2) there was no evidence on which the claim for damages under the Boiler Inspection Act could be submitted to the jury. The District Court sustained petitioner's motion as regards the Boiler Inspection Act, (R. 96a) but submitted the issue under the Federal Employers Liability Act to the jury. The jury returned a verdict for the petitioner and judgment was entered January 26, 1961. Respondent's subsequent motion for new trial was denied by order entered March 2, 1961.

Respondent appealed the action of the District Court to the United States Court of Appeals for the Sixth District. One of the questions presented by respondent's appeal was the District Court's withdrawal of the issue under the Boiler Inspection Act from the Jury. The Court of Appeals reversed the judgment of the District Court and held that said Court was in error in withdrawing from the consideration of the jury, respondent's claim for damages under the Boiler Inspection Act. Judgment was entered March 6, 1962. Petitioner's subsequent petition for rehearing was denied by order entered April 30, 1962.

ARGUMENT

The petitioner maintains that the Court of Appeals was in error in holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury, for the reason that it is readily shown that (1) there was no violation of the Boiler Inspection Act in this case, and (2) even if it be assumed there was such a violation, said violation was not a proximate cause of respondent's claimed injuries.

It is believed that a careful study of Section 23, Title 45 U.S.C., the pertinent regulations of the Interstate Commerce Commission, and the case authorities thereunder can only lead to the conclusion that the unexplained presence of a foreign substance on a locomotive is not within the intent and purpose of the Boiler Inspection Act. In the case of *Ford v. New York, N.H. & H. R. Co.*, (Cir. 2nd 1931) 54 F. 2d 342, cert. den. 285 U.S. 549, an employee was injured as he attempted to board the tender of a moving locomotive. The employee alleged that his hand slipped from a handhold because of the presence of grease on the handhold, and that he received injuries as a result thereof. The court affirmed the lower court's judgment of dismissal, stating in its opinion at page 343:

> "There is no explanation as to how grease came to be placed on the handhold; but there is testimony that the locomotive and tender were inspected that morning and that grease was placed in the grease cups underneath the tender, and the inference is indulged in that the workman who did this in some way placed grease upon the handhold.
>
> "We think the Safety Appliance and Boiler Inspection Acts have no application under these circumstances. * * * Having made the tender safe to operate, if later it became unsafe by putting grease on the handhold, even if such was negligently caused, it is not a violation of the statutory obligation of the ap-

> pellee * * *. If during the operation the safety appliance required by the act was rendered temporarily unsafe by reason of the grease placed thereon, this is not a condition which brings it within the purview of the act."

The Court in the *Ford* case also noted the legislative history of the Act, at page 344:

> "An examination of the debates in Congress on the passage of these acts, shows no intention by Congress to impose civil liability for a condition occurring during the operation of the train which does not affect the construction and maintenance as required by the Safety Appliance Act."

The petitioner maintains that the *Ford* case represents the law as it was intended to be. The basic statutory provision enacted for the protection of employees is the Federal Employees Liability Act, Section 51 et seq., Title 45, U.S.C., which bases employer liability on negligence. The Safety Appliance Act, Section 1 et seq., Title 45, U.S.C., which relates to equipment normally found on train cars, and the Boiler Inspection Act, which relates to equipment on locomotives and tenders, show a legislative intent that certain equipment, so important to the safety of employees, must be maintained free of defects. The absolute liability imposed by the latter acts have the effect of impressing upon carriers the need for the utmost care and inspection in the maintenance of equipment and appliances. It is readily seen that the same objectives are not present when the Safety Appliance Act and Boiler Inspection Act are sought to be invoked because of an unexplained foreign substance on equipment. The fact that a foreign substance was present, without more, can imply no responsibility to the carrier in the sense that the carrier might have remedied the situation, even with an ultimate degree of care. It seems clear that at least one of the purposes of the rules of the

Interstate Commerce Commission is to establish standards of responsibility for those matters over which a carrier has absolutely no control. And one of such standards is the rule requiring daily inspection of locomotives. Code of Federal Regulations, Title 49, Part 91, Section 91.203 (a). See also Section 91.200 which specifies that the rules apply to *inspection and testing* of locomotives. Therefore, it is clear that Section 91.229 (d), which provides that cab aprons shall be kept free of certain substances, describes a condition which is to be met only at the time of the daily inspection.

It is seen that Section 23 only requires that locomotives meet the tests set forth in regulations promulgated under such section. It is submitted that, if the regulations are complied with at the time of an inspection, the subsequent deposit of a foreign substance will not constitute a violation of the Boiler Inspection Act. In the instant case, there is no evidence that the oil on the walkways came from a defective piece of equipment. Indeed, there is no evidence as to how or when the oil came to be on the walkway. Moreover, there is no evidence to show that the locomotive was not inspected as prescribed by the regulations of the Interstate Commerce Commission, or, if it was inspected, that the oil was present at that time. The petitioner contends that under such circumstances there was no violation of the Boiler Inspection Act.

The case of *Lilly v. Grand Trunk Western Railway Co.*, 317 U.S. 481 (1943) has unfortunately been construed too broadly by certain authorities. The *Lilly* case should be confined to its specific facts and should not be held as authority in a case where there is no evidence to explain the presence of the foreign substance. In the case of *Calabritto v. New York, New Haven & Hartford R. Co.*, (Cir. 2d 1961) 287 F. 2d 394, the court applied the holding of the *Lilly* case

to a situation where an employee slipped on sand and oil located on the deck of the locomotive. It is significant that two of the judges concurred in the decision only with great reluctance. Circuit Judge Friendly, in his concurring opinion at page 397, stated:

> "The language of the Boiler Inspection Act * * * does not suggest to me a Congressional purpose to impose on railroads an absolute duty to keep the surfaces of locomotives and tenders as free from foreign matter at all times, as an operating room before surgery * * * Neither does anything in the legislative history of the Act afford the slightest basis for such a construction; indeed, it points rather in the opposite direction."

The petitioner respectfully calls this Court's attention to the authorities which hold that the Safety Appliance Act does not apply to a foreign substance present on the appliances enumerated in the Act. See *Collins v. Southern Pacific Co.*, (Cir. 9, 1961) 286 F. 2d 813. In the *Collins* case, the court distinguished Boiler Inspection Act cases by stating that the Safety Appliances Act uses the word "secure", while the Boiler Inspection Act uses the word "safe". Outside of attempting to limit the application of *Lilly v. Grand Trunk Western R. Co.*, *supra*, there is no reason to distinguish between the presence of oil on equipment located on a locomotive and the presence of oil on similar equipment located on a car.

It is respectfully submitted that nothing in the legislative history or in the language of the Boiler Inspection Act warrants the application of the Act to foreign substances whose presence is inexplained.

Assuming *arguendo*, that there was a violation of the Boiler Inspection Act, it is abundantly clear that such violation was not a proximate cause of respondent's alleged injuries. Respondent testified that he walked in oil on the

walkways of the locomotive (R. 37a). Respondent then debarked the locomotive, lined up a switch, and walked to a telephone located nearby (R. 38a, 39a and 58a). After using the telephone, he walked 200 to 250 feet to a station wagon where he stood and talked to the driver for 5 to 10 minutes (R. 59a). When the locomotive approached, respondent went to the tracks where he "slipped and tripped" as he attempted to board the locomotive. (R. 40a) It is important to note that the ground surface over which respondent walked consisted of cinders and soil (R. 13a and 22a). It is also important to note that there was oil present on the ground surface over which he walked (R. 22a).

On the above state of the evidence, it cannot be said that the oil on the walkway of the locomotive was a proximate cause of respondent's slipping and tripping on a ground line air hose in his attempt to board the locomotive. Such evidence is not sufficient to meet the test set forth in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), stated at pages 483 and 484:

> "Events too remote to require reasonable prevision need not be anticipated * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

The case of *Wright v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 107 O. App. 310, 8 O.O. 2d 236 (1958), cert. den. 359 U.S. 979 (1959) illustrates that there is no proximate cause where, after a violation of the Act occurs, the chain of events is broken by movement to a different area and engagement in unrelated activities. In that case a train was halted by reason of defective coupler and brakes. The plaintiff, a fireman, was instructed to flag an oncoming train to get a spare knuckle for the coupler. After doing this, the plaintiff climbed into the engine cab where he sat for about eight minutes. The conductor then requested

the plaintiff to look in the nose compartment of the engine for a spare knuckle. While in the compartment, the plaintiff slipped on the floor as he threw out the knuckle. Plaintiff claimed his injuries were caused by the defective coupler and brakes. The court held that such events were too remote and were not links in an unbroken chain of reasonably foreseeable events, and said at page 313:

> "As we view the facts in this case, the injuries to plaintiff were occasioned by what had happened in the nose of the diesel engine. If the defendant is to be held liable in this case, it must result from the failure of some duty, if any, it owed to the plaintiff in his use of the compartment in the nose of the diesel. The breaking of the coupler had nothing to do with plaintiff's injuries."

Similarly, in the instant case, the petitioner could only be held liable as a result of a failure of some duty it owed respondent in the area in which he attempted to board the moving locomotive. And such issue was submitted to the jury.

In the instant case, there is no evidence that respondent acquired oil on his shoes. There is no evidence that any such oil remained on his shoes after extensive walking on a cinder and soil surface. There is no evidence that the respondent slipped and tripped because of oil on his shoes. After pure speculation, respondent would then have the jury guess that, if the respondent slipped because of oil on his shoes, such oil came from the walkway of the locomotive and not from the ground surface over which he walked.

It is emphasized that a violation of the Act must be a proximate cause. It need not be the sole proximate cause, but it must be a *proximate* cause. A cause which is too remote in time or in relation to the chain of events is not sufficient. The case of *Rogers v. Missouri Pacific R. Co.*, 352, U.S. 500, does not authorize pure speculation by the

jury. The test set forth in the *Rogers* case is whether the proofs justify *with reason* the conclusion that employer negligence played any part in producing the injury for which damages are sought, and the petitioner maintains that in the case at hand no such reasonable conclusion is justified from the evidence. Only one reasonable conclusion can be drawn in the instant case, and the proper action in regard thereto is stated in *Brady v. Southern Ry. Co., supra*, at pages 479 and 480:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Petitioner submits that the judgment of the Court of Appeals on the question presented should be reversed and that the judgment of the District Court should be affirmed. The foregoing argument indicates the reasons why a writ of certiorari should be allowed in this case. The judgment of the Court of Appeals is in conflict with the case of *Ford v. New York, N. H. & H. R. Co., supra*, as regards the applicability of the Boiler Inspection Act to foreign substances. It is believed that the purpose of the regulations of the Interstate Commerce Commission should be settled by this Court so that the authority of *Lilly v. Grand Trunk Western Railway Co., supra*, is not extended to those cases to which it was not intended to apply. Furthermore, the judgment of the Court of Appeals on the issue of causation under the Boiler Inspection Act is in conflict with the applicable decisions of this Court.

CONCLUSION

For the reasons stated petitioner respectfully prays a writ of certiorari be granted to review the decision of the Court of Appeals in this case.

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14632—George W. Gowins, Plaintiff-Appellant vs. The Pennsylvania Railroad Company, Defendant-Appellee.

[Decided March 6, 1962]

Before: Miller, Chief Judge, Simons, Senior Circuit Judge, and Darr, Senior District Judge.

Miller, Chief Judge. Appellant brought this action under the Federal Employers' Liability Act, Section 51, et seq., Title 45, U. S. Code, and the Boiler Inspection Act, Section 22, et seq., Title 45, U. S. Code, to recover damages for injuries suffered while working as a conductor of a crew operating a freight train of the appellee, The Pennsylvania Railroad Company. At the conclusion of the evidence, the District Judge granted the appellee's motion to withdraw the allegations under the Boiler Inspection Act from the consideration of the jury and the case was submitted to the jury on the issue of negligence under the Federal Employers' Liability Act. The jury returned a verdict for the appellee.

The job orders for the crew directed them to operate a freight train from Georgetown, Ohio to Cadiz Junction, Ohio, and then to take another train from Cadiz Junction to Georgetown, Ohio. The crew attached two locomotives and a caboose to the rear end of the train and also attached two other locomotives on the front end of the train and carried out the assignment.

When the train returned to Georgetown, appellant got off of one of the locomotives, lined up a switch and went to a telephone located at that point to report the train clear

of the switch. He then walked to a station wagon, about 200 to 250 feet away and talked to its driver. He waited there about ten minutes until the locomotives returned, after having taken the cars into the yard. As they approached, at a speed of from eight to ten miles per hour, appellant attempted to get on the engine to ride back to the telephone to report where he put the caboose. He testified that when he went to get on the engine, "I slipped and tripped over a ground air hose," that he was struck by the back grab handle of the front step, "swirled around . . . and knocked to the ground."

The air hose referred to was approximately an inch and a half hose and was used to put air into the cars. One end of the hose was attached to an iron air pipe and the other end would be attached to a car when in use and lying free when not in use. There was testimony that at the time in question the air hose was not in use and was lying on the ground outside of the ties in violation of Safety Rule No. 4533 of the appellee pertaining to maintenance of equipment. Appellant admitted on cross-examination that he saw the air hose on several occasions that day, that he considered the air hose in that position dangerous at that time, but that he did not do anything about it because it was not his job. Appellee also put in evidence Rule No. 1408, which read, "Getting on or off moving equipment, except when necessary for the proper performance of duties, is prohibited." Appellant claimed that his attempt to board the moving engine was necessary in the performance of his duty at the time.

The District Judge submitted to the jury the question of negligence on the part of the appellee and the question of contributory negligence on the part of the appellant. One of appellant's main contentions is that the District Judge

erred in not instructing the jury, as requested by appellant, that the doctrine of assumption of risk was not a defense to the action, Section 54, Title 45, U. S. Code, and that the charge of the District Judge in effect left the jury with the belief that assumption of risk was a defense to the action.

Assumption of risk as a defense, where there is negligence on the part of the employer, has been written out of the Act. But when used in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, it has not been written out of the law. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, concurring opinion of Mr. Justice Frankfurter at page 72, where it was said, "Because of its ambiguity, the phrase, 'assumption of risk,' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded." Assumption of risk was not pleaded as a defense by the appellee. Contributory negligence was pleaded by appellee, and under that issue an instruction permitting the jury to consider appellant's actions in the light of a dangerous condition known to him was proper. Section 53, Title 45, U. S. Code, *Chicago, St. P. M. & O. R. Co. v. Arnold*, 160 F. (2) 1002, C. A. 8th. If the instruction on contributory negligence was a correct one, we do not think it was error to refuse to instruct on the question of assumption of risk. *DePascale v. Pennsylvania R. Co.*, 180 F. (2) 825, 827, C. A. 3rd. We are of the opinion that the District Judge correctly instructed the jury on the issue of contributory negligence. *Atlantic Coast Line R. Co. v. Dixon*, 189 F. (2) 525, 527, C. A. 5th, cert. denied, 342 U. S. 830.

However, under the Boiler Inspection Act, negligence is not the basis of liability and the partial defense of contributory negligence and the bar of assumption of risk

are not available to the employer. The Act has been liberally construed in the light of its prime purpose, the protection of employees, by requiring the use of safe equipment. Any employee engaged in interstate commerce who is injurd by reason of a violation of the Act, has a cause of action under the Act. Section 23, Title 45, U. S. Code; *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481; *Urie v. Thompson, Trustee*, 337 U. S. 163, 188-189. The Act covers not only defects in construction or mechanical operation, but gives protection against the presence of dangerous objects or foreign matter. *Lilly v. Grand Trunk Western R. Co.*, supra; *Calabritto v. New York, N. H. & H. R. Co.*, 287 F. (2) 394, 397, C. A. 2nd.

In the present case, the train was powered by diesel engines. In order to go from the ground into the cab of the locomotive and conversely from the cab to the ground, it was necessary to walk along one of the walkways extending along each side of the two engines from the end of the locomotive to the cab. Appellant's duties required him to get onto and off the locomotives at the head end of the train.

Appellant testified that in the course of the trip he used the walkways on both locomotives all the time, that there was oil on the walkways, that the condition was worse on locomotive 8947, on which he rode on the return trip to Georgetown, and that in the course of his duty it was necessary for him to walk through the oil, "all the time." He also testified that when he attempted to get on the engine, he "slipped and tripped. . . ."

In *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506-507, the Supreme Court said, in a case brought under the Federal Employers' Liability Act, that the test of a jury case is simply whether the proofs justify with reason the

conclusion that employer negligence "played any part, *even the slightest*, in producing the injury or death for which damages are sought" (Emphasis added). If that test is met, a judge is "bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Gibson v. Thompson, Trustee*, 355 U. S. 18, 19; *Ringhiser v. Chesapeake & Ohio Ruy. Co.*, 241 F. (2) 416, C. A. 6th, reversed, 354 U. S. 901; *Moore v. Terminal Railroad Association*, 358 U. S. 31, and cases cited therein. In *Lavender v. Kurn*, 327 U. S. 645, 653, the Court said, "It is no answer to say that the jury's verdict involved speculation and conjecture" and "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." The Boiler Inspection Act is substantially, if not in form, an amendment to the Federal Employers' Liability Act and is subject to the same construction. *Urie v. Thompson, Trustee*, supra, 337 U. S. 163, 188-189.

We are of the opinion that under the rulings in *Lilly v. Grand Trunk Western R. Co.*, supra, 317 U. S. 481, and *Rogers v. Missouri Pacific R. Co.*, supra, 352 U. S. 500, the District Judge was in error in withdrawing from the consideration of the jury appellant's claim for damages under the Boiler Inspection Act. *Calabritto v. New York, N. H. & H. R. Co.*, supra, 287 F. (2) 394.

The judgment is reversed and the case remanded to the District Court for a new trial.

JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 6, 1962]

Appeal from the United States District Court for the Southern District of Ohio.

This Cause came on to be heard on the transcript of the record of the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for a new trial.

Approved for entry:

/s/ Shackelford Miller, Jr.
Chief Judge.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING REHEARING

[Filed April 30, 1962]

Appellee's petition for rehearing having been considered by the Court;

It is ordered that said petition be denied.

Approved for entry:

/s/ Shackelford Miller, Jr.,
Chief Judge, U. S. Court of Appeals for the Sixth Circuit.

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No. 264

In the

Supreme Court of the United States

October Term, 1962

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE W. GOWINS,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1962

No. 264

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE W. GOWINS,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTION PRESENTED

The Question Presented, as stated in the Petition filed by petitioner herein, should be amplified as follows:

1. Where respondent, an employee of petitioner, testified that during a road run it was necessary in the course of his duties to use walkways on petitioner's locomotive in order to go to and from the cab thereof, that there was oil on the walkways and it was therefore necessary for him to walk through the oil "all the time," that after he debarked said locomotive to a ground surface of cinders and soil he lined up a switch and then went to a nearby

telephone and from there walked a distance of 200 to 250 feet to an automobile parked near the tracks, that he conversed with the driver of the automobile 5 or 10 minutes and that he then went to the tracks, and, while attempting to board a moving locomotive, slipped and tripped on a ground line air hose, did the Court of Appeals err in holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury?

STATUTES AND REGULATIONS INVOLVED

In addition to the statute and the regulations cited in the Petition for Certiorari, the following section of the Federal Employers' Liability Act and the following rule of the Interstate Commerce Commission are involved in this case:

Title 45, U.S.C., Section 51:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Code of Federal Regulations, Title 49, Part 91, Section 200a:

> 91.200a. "*Responsibility for design, construction, inspection and repair.* The railroad company is held responsible for the general design, construction, inspection and repair of all locomotives used or permitted to be used on its line. It must know that all inspections, tests and repairs are made and reports made and filed as required, and that all parts and

appurtenances of every locomotive used are maintained in condition to meet the requirements of the law and the rules and instructions in this subpart.

Respondent denies that Section 91.203(a) (Code of Federal Regulations, Title 49, Part 91, Section 91.203(a)) is involved in this petition for writ of certiorari.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case set forth in the Petition for Certiorari insofar as the precise issue which petitioner has raised is concerned, with, however, the following amplification and addition. Respondent's duties required him to get onto and off from the locomotives and, therefore, to use the walkways (R. 36a-37a). Respondent further testified (R. 37a):

Q. And in the course of that trip is it fair to state that you used the walkways of both locomotives? A. All the time.

Q. State to the Court and jury what the condition was of the walkways on those two locomotives. A. Oil on all the locomotives on the walkways, practically all of them but the 8947 was worse than the rest of them.

Q. And in the course of your duty was it necessary for you to walk through the oil? A. All the time.

The foregoing, together with the evidence stated in petitioner's Statement of the Case, comprises the revelant evidence relating to the issue of the Boiler Inspection Act which was admitted at the trial. It was upon that admitted evidence that the decision of the United States Court of Appeals for the Sixth Circuit was based.

The Court of Appeals, therefore, did not rule upon the respondent's alternative question presented in that court.

which alternative question was based upon the claim that certain excluded testimony should have been admitted at the trial as evidence. The excluded testimony bearing on the issue of the Boiler Inspection Act was that of respondent on re-direct examination, which re-direct examination was in response to cross-examination on the violation of rule 1407 of the petitioner. The testimony was ordered stricken by the District Court in the following proceedings (R. 80a):

Q. All right. Now, he also quizzed you on Rule 1407. 'When getting on or off moving equipment, avoid if possible, coal, boards, stones, rubbish, refuse material, ties, rails, balast, holes, openings, bridges, culverts, tressels, etc., likely to result in falling, slipping, tripping, or turning ankle.' Now, Mr. Gowins, why did you not avoid coming into contact with that air line hose? A. Due to the oil on my shoes I slipped and tripped over the ground line hose.

Q. How do you know you had oil on your shoes? A. I had been walking in the oil, always on the walkway of the engines and so much oil in one engine we carried it in the cab.

Q. What engine was that? A. 8947.

* * * * * * * * * *

Mr. Barton: We also move that the statement relative to oil on his shoes also be stricken from the record and the jury to disregard it because that is re-direct examination and there is not one bit of evidence either in direct examination or our cross-examination relative to oil on his shoes.

The Court: Objection sustained. The jury is instructed to disregard it.

Mr. Grieser: Now, wait a minute. May I approach the Bench on this?

The Court: You may.

(Discussion had off the record at the Bench)

Mr. Grieser: Note my exceptions.

Respondent agrees with the decision of the United States Court of Appeals for the Sixth Circuit that the foregoing excluded testimony was not necessary in order to raise an issue under the Boiler Inspection Act for the jury's consideration. Respondent, however, includes the foregoing excluded testimony in his statement of the case for the purpose of preserving his right to refer to the same should it become necessary in any subsequent proceedings in this case.

ARGUMENT

In holding that respondent's claim for damages under the Boiler Inspection Act should have been submitted to the jury, the United States Court of Appeals for the Sixth Circuit was applying the controlling law as announced by this Court. The evidence admitted at the trial presented issues for the jury's determination of (1) the violation of the Boiler Inspection Act and (2) whether such violation caused in whole or in part, that is, "played any part, even the slightest, in producing," respondent's injuries. *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481, and *Rogers vs. Missouri Pacific Railway Company*, 352 U.S. 500.

The respondent adopts the sound opinion of the United States Court of Appeals for the Sixth Circuit on the foregoing points, which opinion is a conclusive answer to the contentions made by petitioner in the Petition for Certiorari. The respondent will elaborate only to expose further the fallacies and inaccuracies contained in the Petition.

First, under the holding of this Court in *Lilly vs. Grand Trunk Western Railroad Company*, 317 U. S. 481, supra, it was encumbent upon the trial court to submit the issue of the violation of the Boiler Inspection Act to the jury. This requirement stemmed both from the command of the general language contained in the pertinent section (Title 45, U.S.C., Section 23) and from the regulation promulgated by the Interstate Commerce Commission which under said statute acquired the force of law. (C.F.R., Title 49, Part 91, Section 91.229(a) and (d)) This Court in the *Lilly* case expressly rejected the contention which petitioner is now trying to resurrect, namely, that the Act covers only defects in construction

or mechanical operation and does not protect against the presence of dangerous foreign matters or objects. In 1943, almost twenty years ago, this Court put that contention to rest in the case of *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481; at page 487:

> "From various cases denying recovery under the Act, respondent attempts to extract a general rule that the Act covers only defects in construction or mechanical operation and affords no protection against the presence of dangerous objects or foreign matter. But there is no warrant in the language of the Act for construing it so narrowly, or for denying the Commission power to remedy shortcomings, other than purely mechanical defects, which may make operation unsafe. The Act without limitation speaks of equipment 'in proper condition and safe to operate . . . without unnecessary peril to life or limb.' Conditions other than mechanical imperfections can plainly render equipment unsafe to operate without unnecessary peril to life or limb. Whatever else may be said about the cases relied upon by respondent, they are sufficiently distinguishable in that they either did not involve or did not consider Rule 153 or any comparable regulation."

The foregoing statement and holding by this Court is extremely significant, for the jury in the *Lilly* case expressly and specially found that these was *no* mechanical or physical defect (a leak in the tank) as claimed and alleged by the employee. The presence of the dangerous foreign substance (water and ice) was sufficient, *per se*, to support a finding that the Act was violated.

While it is true that the *Lilly* case did involve a rule of the Interstate Commerce Commission, the foregoing language strongly (if not conclusively) shows that the same result would follow under the provisions of the Act.

Even absent such a rule as that involved in the instant case, therefore, a jury issue was presented on the viola-

tion of the Boiler Inspection Act. *Calabritto vs. New York, New Haven & Hartford R. Co.*, 287 Fed. 2d 394; *Minehart vs. Southern Pacific Company*, 288 P. 2d 999.

The Interstate Commerce Commission, however, pursuant to the authority contained in the foregoing Act did promulgate a regulation which applies squarely to the facts in the instant case. Code of Federal Regulations, Title 49, Chapter 1, Subpart C—other than steam locomotives and appurtenances, Section 91.229:

> "*Cabs and Aprons.* (a) Definition. The word 'cab' as used in this subpart means that portion of the superstructure utilized for housing the enginemen and parts or appurtenances of the locomotive and through which a passageway is provided for the use of the enginemen."
>
> * * * * * * * * *
>
> "(d) *Floors.* Deck plates and floors of cabs, passageways and compartments shall be kept free from oil, waste, or any obstruction that will create unnecessary peril. Deck plates and metal floors shall be properly roughened, or other provisions made, to afford secure footing."

The walkways involved in this case were "passageways" within the foregoing rule, for they provided the only means of going into and out from the cab. The rule specifically requires that such "passageways * * * shall be kept free from oil, * * *." The pertinent portion of the regulation involved in the *Lilly* case provided that the "top of tender behind fuel space shall be kept clean, * * *." This Court in interpreting the foregoing language of the rule involved in the case of *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481, stated at pages 486, 487:

> "From the phrasing of Rule 153 we think it aimed at requiring the top of the tender to be kept free of foreign matter which would render footing insecure.

> for example, coal, dust, debris, grease, waste water, and ice. While the locomotive inspection rules are generally devoted to details of construction and specification of materials, at least one other rule deals with the condition of surfaces upon which employees must stand. In using the word 'clean' the Commission must have meant something more than mere manner of construction or mechanical operation, because 'clean' does not naturally lend itself to such a limited connotation. That something more is the *continuing duty* of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous." (Emphasis supplied)

A fortiori, the pertinent language of the Rule involved in the instant case, that the passageways "shall be kept free from oil," could only mean that the Commission was imposing a *continuing duty* on the railroad to keep the passageways free from oil.

Petitioner's contention that such a requirement relates only to the time of daily inspection, and not to any subsequent violations, is completely out of harmony with the plain language of the rules and with the decisions of this Court holding that the railroad has a continuing duty to conform to the requirements of the Boiler Inspection Act. Section 91.203 (a), a portion of which is set forth in petitioner's petition at page 3, does not limit the effect of Section 91.229 (d) as contended by petitioner. Section 91.203(a) relates only to inspections and reports thereof that are required to be made. It has no direct reference to and does not limit the foregoing Section 91.229(d). In fact, Section 91.203(c) specifically states that the rule prescribes only the minimum number of inspections required and is not intended to prevent the railroad from making additional inspections.

Section 91.200(a) on the contrary does by its terms relate to the entire subpart containing the rules in question, including Section 91.229(a) and (d). The former section places upon the railroad an absolute duty that it "must know" that inspections, tests, repairs and reports are made and filed, "*and* that all parts and appurtenances of every locomotive used *must* be maintained in condition *to meet requirements of the law and the rules . . . in this subpart.*" (Emphasis supplied) The foregoing rule, therefore, by its express terms places a duty upon the railroad not only to make and file all inspections, tests, repairs and reports, but in addition a duty to maintain all parts and appurtenances in condition to meet the requirements of the rules in the subpart, one of which requirements is the clear, unqualified command that 'passageways shall be kept free from oil." Section 91.200a, therefore, expressly rejects the limited effect that petitioner contends for in its Petition.

Of course, the foregoing rule is only a codification of common sense and in harmony with the Act and the holding in *Lilly vs. Grand Trunk Western Railroad Company*, 317 U.S. 481, supra. It would indeed be idle to require the railroad to meet the requirements of the Act and the rules promulgated thereunder *only* at the time of daily inspection prior to the use of the locomotive. The Act (Title 45, U.S.C., Section 23) specifically refers to a locomotive "in use" on the line. The humanitarian purpose of the Act, moreover, would be thwarted, for the employee would be deprived of the protection at the very time when he needs it, namely, during the use of the locomotive.

The issue of the violation of that Act, therefore, should have been submitted to the jury under the holding of this court and the pertinent rules of the Interstate Com

mission. The Act and the rules clearly protect against the presence of dangerous foreign matters, in this instance by express reference to oil, and place upon petitioner a continuing duty to comply with the requirements of the Act and the rules while the locomotive is in use on respondent's line.

Petitioner's second major premise is that if there was evidence of a violation of the Boiler Inspection Act, such violation was as a matter of law not a proximate cause of respondent's alleged injuries. This contention is likewise contrary to the decisions of this Court. The Boiler Inspection Act (Title 45, U.S.C., Sections 22, et seq) and the Federal Employers' Liability Act (Title 45, U.S.C., Sections 51, et seq) are in *pari materia*; or stated in another way, the Boiler Inspection Act is substantially, if not in form, an amendment to the Federal Employers' Liability Act: *Urie vs. Thompson, Trustee*, 337 U.S. 163, 188-189; *McCarthy vs. Pennsylvania Railroad Company*, 156 Fed. 2d 877. Accordingly, if the violation of the absolute duty under the Boiler Inspection Act (dispensing with the requirement of negligence) caused "in whole or in part" (the test for causation under the Federal Employers' Liability Act, Title 45, U.S.C., Section 51) the injuries to respondent, the petitioner is liable. In the leading case of *Rogers vs. Missouri-Pacific Railroad Company*, 352 U.S. 500, the statutory test for a jury question on causation was held to be whether the negligence "played any part, even the slightest, in producing" the injuries. So here, if the evidence is such that a jury may conclude with reason that oil on the walkways played any part, even the slightest, in producing the injuries to respondent, then that issue should have been submitted to the jury. Certainly the jury could have found with reason that respondent

acquired oil on his shoes while walking on walkways covered with oil "all the time" and that some of the oil remained on his shoes up until the time that he slipped and tripped and, therefore, caused at least in the slightest part his resulting injuries. That such a finding would involve some speculation and conjecture or that other findings and other causes of the injuries could reasonably be made will not and did not justify the District Court from taking the issue from the jury. *Rogers vs. Missouri-Pacific Railroad Company*, 352 U. S. 500, 506-507, supra; *Lavender vs. Kurn*, 327 U.S. 645, 653; *Harris vs. Pennsylvania Railroad Company*, 80 Sup Ct. 22; *Schulz, Admrx. vs. Pennsylvania Railroad Company*, 350 U.S. 523; and *Gibson vs. Elgin, Joliet & Eastern Railroad Company*, 246 Fed. 2d 834.

The decision of the Sixth Circuit Court of Appeals on the issue of the Boiler Inspection Act was, in summary, in complete accord with the decisions of this Court and the applicable statutes and rues of the Interstate Commerce Commission. It may or may not be that the Circuit Court's decision herein was in conflict with that of the Second Circuit rendered in 1931 in the case of *Ford vs. New York, N. H. & H. R. Co.*, 54 Fed. 2d 342, cert. denied, 285 U.S. 549, (no rule of the Interstate Commerce Commission was involved therein); if so, the *Ford* case has been overruled by this Court in the case of *Lilly vs. Grand Trunk R. Co.*, 317 U.S. 481, supra, which squarely held that the Act *was* applicable to a foreign substance although no defect of construction or mechanics was present. The controlling and indisputable point is that the decision of the Sixth Circuit was in accord with the *Lilly* case and subsequent decisions under the Act, including the previously cited cases of *Calabritto vs. New York, N. H. & H. R. Co.*, 287 Fed. 2d 394, supra (decided by the same Second

Circuit Court of Appeals), and *Minehart vs. Southern Pacific Co.*, 288 P. 2d 999.

Similarly, on the issue of causation, the decision of the Sixth Circuit is in complete harmony with the myriad of cases decided by this Court and Circuit Courts, including the leading case articulating the controlling test for causation, *Rogers vs. Missouri Pacific Railroad Company*, 352 U.S. 500, supra, the leading case permitting broad scope to the jury in speculation and conjecture, *Lavender vs. Kurn*, 327 U.S. 645, supra, and the many analogous decisions applying the same principles to violations of the Safety Appliances Act and the Boiler Inspection Act, *Harsh vs. Terminal R. Co.*, 75 Sup. Ct. 362, reversing 114 N.E. 2d 901; *Coray vs. Southern Pacific Co.*, 335 U.S. 520; *Carter vs. Atlanta & St. Andrews Bay R. Co.*, 338 U.S. 430; *Affolder vs. N. Y., Chicago & St. L. R. Co.*, 339 U.S. 96; *New York, New Haven & Hartford R. Co. vs. Leary*, 204 Fed. 2d 461; *Givens vs. Missouri-Kansas-Texas R. Co. of Texas*, 195 Fed. 2d 225.

In short, we submit to this Court that there is no reason to review the decision of the Sixth Circuit on the Boiler Inspection Act by writ of certiorari whether viewed from the considerations set forth in Rule 19 of this Court or otherwise.

Respectfully submitted,

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